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SOKOLOFF

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA - FRESNO

ANTHONY LUCKEY,

Plaintiff,

v.

CITY OF PORTERVILLE and BRUCE  
SOKOLOFF,

Defendant.

Case No.: 1:23-cv-00551-BAM

Complaint Filed: April 7, 2023  
FAC Filed: August 7, 2023  
SAC Filed: September 6, 2023  
TAC Filed: November 8, 2024

**DEFENDANTS' REPLY TO PLAINTIFF  
ANTHONY LUCKEY'S OPPOSITION TO  
DEFENDANT'S MOTION TO DISMISS  
PLAINTIFF'S THIRD AMENDED  
COMPLAINT**

Date: February 21, 2025  
Time: 9:00 a.m.  
Courtroom: 8

Defendant CITY OF PORTERVILLE ("City") respectfully submits the following Reply to Plaintiff ANTHONY LUCKEY's ("Plaintiff") Opposition to Defendant's Motion to Dismiss Plaintiff's Third Amended Complaint ("TAC"):

**I. INTRODUCTION**

Despite multiple opportunities to amend his pleadings, Plaintiff continues to assert insufficient and legally flawed claims that fail to meet the requisite standards under Rule 12(b)(6). Plaintiff's opposition attempts to mischaracterize both the allegations in the TAC and the Court's prior order, relying on conclusory assertions and procedural distractions rather than substantive

1 legal arguments.<sup>1</sup>

2 Plaintiff fails to cure the deficiencies identified by the Court in his claims for race  
3 discrimination under Title VII and the Fair Employment and Housing Act (“FEHA”). His  
4 allegations regarding “similarly situated” comparators remain conclusory, unsupported by  
5 material facts, and insufficient to establish a plausible inference of discriminatory intent.  
6 Additionally, Plaintiff’s attempt to revive his 42 U.S.C. § 1983 claim against Defendant Sokoloff  
7 directly contradicts the Court’s prior dismissal with prejudice, and his claim under Article I,  
8 Sections 8 and 31 of the California Constitution lacks a proper legal basis.

9 For these reasons, and as set forth in detail below, Defendants respectfully request that the  
10 Court dismiss Plaintiff’s Third Amended Complaint with prejudice.

## 11 **II. LEGAL ARGUMENT**

12 Plaintiff’s opposition fails to address the critical deficiencies in his claims under Title VII  
13 and the FEHA, which the Court previously identified. Despite Plaintiff’s attempts to rely on  
14 conclusory assertions and vague allegations, the TAC still fails to allege sufficient facts to satisfy  
15 the required elements of a prima facie case for race discrimination.

### 16 **A. PLAINTIFF’S FIRST AND FOURTH CLAIMS FOR RACE** 17 **DISCRIMINATION FAIL TO STATE A PLAUSIBLE CLAIM FOR** 18 **RELIEF**

#### 19 **1. Plaintiff Fails to Plead That Similarly Situated Individuals Were** 20 **Treated More Favorably**

21 To satisfy the “similarly situated” element of a disparate treatment claim, a plaintiff must  
22 allege facts showing that employees outside his protected class were treated more favorably and  
23 were similarly “in all material respects.” See *Weil v. Citizens Telecom Servs. Co., LLC*, 922 F.3d  
24 993, 1004 (9th Cir. 2019). Superficial similarities, such as shared job titles, are insufficient.

25 \_\_\_\_\_  
26 <sup>1</sup> Defendant will not address the “Procedural History” in Plaintiff’s Opposition and the  
27 declaration from her counsel, which present a one-sided version of the parties’ meet and confer  
28 efforts *before Plaintiff filed his TAC*. Those discussions have nothing to do with the deficiencies  
in the TAC, which is replete with new, immaterial and inflammatory allegations Plaintiff has  
raised in attempt to revive his dismissed claims.

1 Instead, the analysis requires consideration of factors such as job responsibilities, supervisory  
 2 relationships, performance standards, and the nature of the alleged misconduct. *Vasquez v.*  
 3 *County of Los Angeles*, 349 F.3d 634, 641 (9th Cir. 2003); *Leong v. Potter*, 347 F.3d 1117, 1124  
 4 (9th Cir. 2003).

5 In *Leong v. Potter*, 347 F.3d 1117 (9th Cir. 2003), the Ninth Circuit affirmed the dismissal  
 6 of Title VII claims because the purported comparators were not similarly situated. To establish a  
 7 prima facie case under Title VII, Leong needed to show that similarly situated individuals outside  
 8 his protected class were treated more favorably. Unlike Leong, the purported comparators were  
 9 not subject to a "Last Chance Agreement," which provided stricter conditions for continued  
 10 employment due to Leong's history of violations. Furthermore, none of the comparators had  
 11 accumulated a comparable record of misconduct. The court emphasized that employers must be  
 12 allowed to differentiate discipline based on individual circumstances, particularly where  
 13 employees have been granted prior leniency or are subject to specific conditions, and as such,  
 14 "the district court did not err in holding that Leong failed to establish a prima facie case of  
 15 discrimination." *Id.* at 1124. Similarly, Plaintiff has similarly failed to plead sufficient facts to  
 16 show he is similarly situated to his purported comparators.

17 Here, Plaintiff merely alleges his comparators shared the same job title and also engaged  
 18 in pursuits. This superficial similarity is insufficient under the standard articulated in *Leong*.  
 19 Crucially, Plaintiff omits material distinctions, including but not limited to the alleged  
 20 comparators' employment status, the nature of their alleged misconduct, the direct supervisors of  
 21 each incident, or the supervisors who decided whether to initiate an investigation or impose  
 22 discipline on the others.

23 Critically, Plaintiff does not specify the detail assignments of the White officers or  
 24 whether their pursuits involved abandoning a detail. This is critical because he does not allege he  
 25 was investigated and eventually terminated for merely engaging in a pursuit. Rather, he alleges he  
 26 was investigated **for leaving his detail** to engage in the pursuit. TAC ¶ 26 ("[Sokoloff] was mad  
 27 that Plaintiff did a traffic stop while he was assigned on a detail"). Plaintiff attempts to justify  
 28 this misconduct in his TAC by claiming a "supervisor" ordered him to pursue the feeling suspect,

1 but even if that were true, it is only a factor that may mitigate or explain the misconduct of  
 2 leaving his detail to engage in a pursuit. There are no allegations that suggest that Sokoloff or the  
 3 City did not consider this mitigating allegation when deciding whether he engaged in misconduct.  
 4 Again, Plaintiff's superficial comparisons are insufficient to meet the similarly-situated standard.

5 Additionally, Plaintiff was a probationary employee (TAC ¶ 42), while there are no  
 6 allegations in the TAC that the alleged "White" officers who were allegedly treated more  
 7 favorably were also on probation. This distinction is significant, as probationary employees are  
 8 subject to stricter scrutiny. *See Trejo v. County of Los Angeles*, 50 Cal.App.5th 129, 135 (2020)  
 9 ("There are several differences between permanent and probationary employees from both the  
 10 perspectives of the employee and their employer. [ ] [T]he crucial difference . . . is that it is much  
 11 more difficult to terminate a permanent employee than it is to fire an employee on probation  
 12 [Citation]").

13 Plaintiff fails to identify whether the comparator officers were subject to the same  
 14 supervisors or disciplinary review processes, which is essential to determining whether the  
 15 situations were analogous. TAC ¶¶ at 23, 25, 31, 35. "[T]o be deemed 'similarly-situated', the  
 16 individuals with whom the plaintiff seeks to compare his/her treatment must have dealt with the  
 17 same supervisor, have been subject to the same standards[,] and have engaged in the same  
 18 conduct without such differentiating or mitigating circumstances that would distinguish  
 19 their conduct or the employer's treatment of them for it." *Ferretti v. Pfizer Inc.*, No. 11-CV-  
 20 04486, 2013 WL 140088, at \*17 (N.D. Cal. Jan. 10, 2013). Here, Plaintiff has failed to allege  
 21 whether he and his White comparators shared similar job responsibilities, worked under the same  
 22 supervisors and subject to the same performance and conduct standards, or engaged in similar  
 23 behavior without mitigating differences.

24 By neglecting these critical distinctions, Plaintiff fails to meet the "similarly situated"  
 25 requirement as outlined in *Leong v. Potter*. Additionally, as the Ninth Circuit held in *Weil*, a  
 26 plaintiff must plead more than general similarities; they must establish comparability "in all  
 27 material respects." *Weil*, 922 F.3d at 1004. The superficial comparisons alleged in the TAC fall  
 28 far short of this standard.

Finally, it should be noted that Plaintiff's interpretation of *Ballou v. McElvain*, 29 F.4th 413 (9th Cir. 2021) is overly narrow because it oversimplifies the Ninth Circuit's analysis of the "similarly situated" standard. The court did not hold that merely holding the same position and engaging in the same conduct is sufficient to establish comparability for purposes of discriminatory intent. Instead, the court considered multiple factors, including material similarities in position, conduct, and circumstances, while also emphasizing that the similarly situated standard is flexible and not rigidly confined to identical situations.

**2. Plaintiff Fails to Establish Other Circumstances Giving Rise to an Inference of Discrimination**

In the alternative, Plaintiff fails to plead sufficient "other circumstances" that plausibly suggest his termination was motivated by race discrimination. Instead, Plaintiff relies on conclusory allegations about Defendant Sokoloff's alleged religious beliefs, which fail to establish a causal link between those beliefs and Plaintiff's termination. (TAC ¶¶ 20, 50). Plaintiff's allegations lack specificity and fail to address critical questions, including: Whether Sokoloff was the decision-maker in Plaintiff's termination or merely one participant in the process and whether Plaintiff's termination letter—stating he failed to meet the standards of a probationary officer—was consistent with department practices for similarly situated employees. (TAC ¶ 42).

Plaintiff's reliance on vague allegations of Sokoloff's alleged bias and unrelated commentary is insufficient to support an inference of discrimination. See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). Without more specific allegations tying Sokoloff's alleged bias to Plaintiff's termination, these claims fail as a matter of law.

**B. PLAINTIFF'S SECOND CLAIM UNDER 42 U.S.C. § 1983 IS BARRED BY THE COURT'S PRIOR ORDER AND THE STATUTE OF LIMITATIONS**

Plaintiff improperly seeks to reassert claims against Defendant Sokoloff that were dismissed with prejudice in the Court's prior order. The attempt to circumvent the Court's ruling lacks merit and should be rejected.

1 **1. The Court Dismissed Plaintiff's § 1983 Claim Against Sokoloff with**  
 2 **Prejudice**

3 The Court explicitly dismissed Plaintiff's § 1983 claim against Sokoloff with prejudice  
 4 insofar as it sought money damages for alleged interference with Plaintiff's right to intimate  
 5 association. (Dkt. 37 at 11-13). Plaintiff now attempts to revive this claim by reframing it as a  
 6 violation of his right to associate with a member of another race. However, this reframing does  
 7 not alter the substance of the claim and directly contradicts the Court's prior ruling. See *Ketab*  
 8 *Corp. v. Mesriani & Assocs.*, 2015 U.S. Dist. LEXIS 163133, at \*8 (C.D. Cal. Dec. 4, 2015) (new  
 9 legal claims cannot be raised after dismissal with prejudice).

10 Plaintiff argues that the Court "noted that Plaintiff's Section 1983 claim was also based on  
 11 race discrimination." (Opp., 9:21-22.) Defendant believes Plaintiff's argument is incorrect.  
 12 Plaintiff's argument is based on the Court's footnote 3, on page 8 of its Order (Dkt. 37), which  
 13 states:

14 Plaintiff's second claim alleges unlawful conduct by "intentionally discriminating  
 15 against him on the basis of his race and interfering with his intimate relationship  
 16 with a white, Hispanic, female co-worker." (SAC ¶ 25.) By this order, the court  
 17 grants leave to amend as to the claims based on race discrimination. Therefore,  
 18 the issue of qualified immunity is focused on the alleged right to intimate  
 19 association.

20 Plaintiff's section 1983 claim was (and remains), at best, unclear. Defendant interpreted it  
 21 as a claim alleging a violation of the right to associate, and it appears the Court did as well given  
 22 that the Court's analysis addressed only the right to intimate association. Defendant interprets the  
 23 Court's footnote as recognizing that it granted Plaintiff leave to amend his race discrimination  
 24 claims (i.e., his first and fourth claims), not as an invitation for Plaintiff to recast his failed "right  
 25 to intimate association claim" as a constitutional race discrimination claim against Sokoloff.

26 **2. The § 1983 Claim is Time-Barred**

27 To the extent Defendant is mistaken about the Court's footnote, and the Court allowing  
 28 Plaintiff to recharacterize his dismissed "right to association" claim as a constitutional race  
 discrimination claim, the new iteration of the claim is a new theory that neither Defendant nor the  
 Court recognized in the SAC. Even if Plaintiff's claim could proceed under a new theory, it is

1 barred by the two-year statute of limitations applicable to § 1983 claims in California. See *Cal.*  
 2 *Civ. Proc. Code* § 335.1. Plaintiff's allegations concern events that occurred in 2021, yet he first  
 3 raised this purported "association" theory in his TAC filed on November 8, 2024—well beyond  
 4 the two-year limitations period. (TAC ¶¶ 20, 45). Accordingly, the claim is untimely and must be  
 5 dismissed.

6 **C. PLAINTIFF'S THIRD CLAIM UNDER ARTICLE I, SECTIONS 8 AND 31**  
 7 **OF THE CALIFORNIA CONSTITUTION LACKS LEGAL BASIS**

8 Plaintiff's argument that Article I, Sections 8 and 31 of the California Constitution  
 9 provide a standalone private right of action is legally unsupported and contrary to established  
 10 precedent. California courts have consistently held that claims for employment discrimination  
 11 must be brought under the Fair Employment and Housing Act ("FEHA"), which provides the  
 12 exclusive statutory framework for such claims. See *Estes v. Monroe*, 120 Cal. App. 4th 1347,  
 13 1355 (2004). Article I, Section 8 of the California Constitution prohibits discrimination in  
 14 employment, but it does not provide an independent cause of action outside FEHA. *Himaka v.*  
 15 *Buddhist Churches of Am.*, 919 F. Supp. 332, 335 (N.D. Cal. 1995).

16 Similarly, Article I, Section 31 does not confer a private right of action for race  
 17 discrimination. Plaintiff's reliance on Section 31(g) is misplaced, as that provision merely  
 18 specifies the remedies available for claims properly brought under existing California  
 19 antidiscrimination laws, such as FEHA. See *Connerly v. Schwarzenegger*, 146 Cal. App. 4th 739,  
 20 750–51 (2007). Plaintiff's argument that Article I, Section 31 of the California Constitution  
 21 expressly provides a private right of action for damages is unsupported by the text of the  
 22 provision or relevant case law. While Section 31 is self-executing, as stated in subdivision (h),  
 23 and thus enforceable without enabling legislation, it does not explicitly create an independent  
 24 private right of action for damages. Subdivision (g) further underscores this limitation by tying  
 25 the remedies for violations of Section 31 to those available under "then-existing California  
 26 antidiscrimination law." This language indicates that any remedies must be derived from  
 27 established statutory frameworks, such as the FEHA, which explicitly provides private causes of  
 28 action and remedies.



In addition, the cases Plaintiff cites in support of his argument recognize common law wrongful termination in violation of public policy causes of action against employers. It has been established repeatedly that a plaintiff cannot maintain common law causes of action against a public employer. *See Miklosy v. Regents of Univ. of Cal.*, 44 Cal. 4th 876, 899 (2008).

**III. CONCLUSION**

The Court's order granting Defendant's motion to dismiss instructed that Plaintiff had a final opportunity to amend. Plaintiff's opposition fails to address the fundamental deficiencies in his TAC and instead relies on mischaracterizations of the Court's prior rulings and applicable law. For the reasons stated above, Defendant respectfully requests that the Court grant its Motion to Dismiss in its entirety, with prejudice.

Dated: January 31, 2025

LIEBERT CASSIDY WHITMORE

By: \_\_\_\_\_



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**PROOF OF SERVICE**

I am a citizen of the United States and resident of the State of California. I am employed in San Francisco, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On **January 31, 2025**, I served the foregoing document(s) described as **DEFENDANTS' REPLY TO PLAINTIFF ANTHONY LUCKEY'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S THIRD AMENDED COMPLAINT** in the manner checked below on all interested parties in this action addressed as follows:

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☒ **(BY ELECTRONIC SERVICE PROVIDER)** I am readily familiar with the firm's practice for filing electronically. Through use of the Court's CM/ECF electronic filing system, I arranged a true and correct copy of the above-reference documents to be electronically served to the e-mail address(es) registered with the court this day in the ordinary course of business following ordinary business practices.

Executed on **January 31, 2025**, at San Francisco, California.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.



Maleena Srioudom